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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE,

Plaintiffs,

vs.

PRESIDENT DONALD J. TRUMP, UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as U.S. Secretary of State; UNITED STATES ARMY CORPS OF ENGINEERS; LT. GENERAL TODD T. SEMONITE, Commanding General and Chief of Engineers; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; GREG SHEEHAN, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; UNITED STATES BUREAU OF LAND MANAGEMENT, and

CV 19-28-GF-BMM

OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED AND SUPPLEMENTAL COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 15

DAVID BERNHARDT, in his official capacity as Acting U.S. Secretary of the Interior,

Defendants,

TRANSCANADA KEYSTONE PIPELINE, LP, a Delaware limited partnership, and TC ENERGY CORPORATION, a Canadian Public company,

Defendant-Intervenors.

Defendant-Intervenors TransCanada Keystone Pipeline, LP and TC Energy Corporation ("TC Energy") respectfully submit this opposition to Plaintiffs' Motion for Leave to File Third Amended and Supplemental Complaint Under Federal Rule of Civil Procedure 15 (the "Motion" (Dkt. No. 142)).

INTRODUCTION

Plaintiffs' initial complaint, filed in April 2019, and their First Amended Complaint, filed in July 2019, challenged the President's issuance of a Presidential permit for the Keystone XL Pipeline ("Keystone XL"). The parties have filed and fully briefed cross-motions for summary judgment on those claims, and this Court heard oral argument on those motions in April of this year.

Plaintiffs now request leave to amend their complaint to challenge actions of federal agencies that are separate and apart from the issuance of the Presidential permit. While Plaintiffs challenged the Presidential permit on constitutional

grounds, they now seek to challenge a permit issued by the Bureau of Land Management ("BLM") and a supplemental environmental impact statement on a variety of statutory grounds. The proposed amendment is untimely, because the agency actions Plaintiffs seek to challenge were taken over eight months ago. It is also unduly prejudicial to TC Energy. It would unnecessarily prolong the litigation over the Presidential permit by forcing TC Energy to defend against new legal challenges to separate agency decisions that were raised in an amended complaint filed after the completion of summary judgment briefing and an extensive oral argument (conducted over four and a half months ago) on their challenges to the Presidential permit.

As set forth below, the factors articulated by established Ninth Circuit law weigh heavily against amendment under the present circumstances. The Court therefore should deny Plaintiffs' motion for leave to amend and put an end to Plaintiffs' attempts to expand the scope of the litigation beyond recognition.

BACKGROUND

Nearly a year and a half ago on April 5, 2019, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (the "Complaint") seeking to invalidate the permit that President Trump issued on March 29, 2019, authorizing 1.2 miles of oil pipeline facilities for Keystone XL at the U.S.-Canadian border. (*See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Leave to File

Third Amended and Supplemental Complaint Under F.R. Civ. Pro. 15, "Mem.," at 3 (Dkt. No. 142-2).) Plaintiffs' Complaint alleged that issuance of the Presidential permit violated two provisions of the U.S. Constitution: the Property Clause in Article IV, Section 3, Clause 2, and the Commerce Clause in Article I, Section 8, Clause 3. (*Id*.)

On June 27, 2019, the Federal Defendants moved to dismiss the Complaint. (*Id*.) TC Energy requested leave to intervene in the lawsuit that same day to defend its substantial interests in completing Keystone XL. (Dkt. No. 20.) Plaintiffs filed a motion for a preliminary injunction on July 10, 2019, which TC Energy and the Federal Defendants both opposed. (Mem. at 4.) On July 16, 2019, TC Energy moved to dismiss the Complaint. (*Id*. at 3.)

Rather than respond to the pending motions to dismiss, Plaintiffs on July 18, 2019 filed their First Amended Complaint for Declaratory, Injunctive, and Mandamus Relief (the "First Amended Complaint"). (*Id*. at 3-4.) Plaintiffs added a claim that the Presidential permit was issued in violation of Executive Order 13,337 to their two previously asserted constitutional challenges to the permit. (*Id*.)

On August 1, 2019, TC Energy and the Federal Defendants filed a second motion to dismiss, this time seeking dismissal of the First Amended Complaint. (*Id*. at 4.) The Court heard argument on the fully briefed motion for preliminary

injunction and motions to dismiss on October 9, 2019. (*Id*. at 4; Dkt. No. 66.) The Court denied the motions on December 20, 2019. (Mem. at 4.)

That same day, the United States Department of State ("Department of State") published notice of the issuance of the Final Supplemental Environmental Impact Statement for Keystone XL ("2019 FSEIS") that Plaintiffs now seek to challenge in the proposed Third Amended and Supplemental Complaint for Declaratory, Injunctive, and Mandamus Relief (the "Third Amended Complaint" or "Third Am. Compl."). 84 Fed. Reg. 70,187, 70,188 (Dec. 20, 2019). On January 22, 2020, BLM issued its Record of Decision ("ROD") granting a right-of-way and temporary use permit for Keystone XL – the second action that Plaintiffs seek to challenge in the proposed Third Amended Complaint. (Mem. at 2-3.)

A few days later, TC Energy moved for summary judgment on the claims in Plaintiffs' First Amended Complaint. (*Id*. at 4.) Plaintiffs renewed their motion for a preliminary injunction a week later, and the motion was fully briefed on February 18, 2020. (*Id*.) On February 25, 2020, Plaintiffs and the Federal Defendants filed their own motions for summary judgment on the claims in the First Amended Complaint. (*Id*.) Before the motions for summary judgment were fully briefed, Plaintiffs filed a motion for leave to file a Proposed Second Amended Complaint for Declaratory, Injunctive, and Mandamus Relief (the "Proposed Second Amended Complaint" or "Proposed Second Am. Compl." (Dkt. No. 108-1)). (*See*

id. at 4-5.) The Proposed Second Amended Complaint did not challenge the 2019 FSEIS or the ROD. It sought to add a constitutional challenge to the new Executive Order governing issuance of presidential permits. (Proposed Second Am. Compl. ¶¶ 82-92.)

On April 16, 2020, the Court heard argument on the cross-motions for summary judgment on the claims in the First Amended Complaint, as well as Plaintiffs' motion for a preliminary injunction and their motion or leave to file a Second Amended Complaint. (Mem. at 4.) The Court has not issued a decision on those pending motions.

With the motions pending, Plaintiffs sought leave to amend their complaint on August 21, 2020 for the third time. The Third Amended Complaint seeks to challenge the 2019 FSEIS and the BLM ROD. (Third Am. Compl. ¶¶ 101-176 (Dkt. No. 142-1) (raising claims similar to those raised in two other lawsuits currently pending before this Court). *See also Bold All. v. U.S. Dep't of the Interior*, 4:20-cv-00059-BMM-JTJ (D. Mont.); *Assiniboine & Sioux Tribes of the Ford Peck Indian Rsrv. v. U.S. Dep't of the Interior*, 4:20-cv-00044-BMM-JTJ (D. Mont.).

ARGUMENT

Absent written consent by the opposing party, a party seeking to amend its pleading outside of the stated time period may only do so with leave of court. Fed.

R. Civ. P. 15(a)(2); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). Federal Rule of Civil Procedure 15 allows courts to permit a party to "serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Courts should not automatically grant leave to amend under either Rule 15(a) or Rule 15(d). Rather, courts should consider the following factors when assessing whether to grant leave to amend: "bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint." *See Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004) (addressing Rule 15(a)); *Russo-Wood v. Yellowstone Cnty.*, No. CV 17-38-BLG-TJC, 2019 WL 1102680, at *5 (D. Mont. Mar. 7, 2019) (denying the plaintiff's motion for leave to amend); *Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008, 1023 (D. Mont. 2015) (same factors apply to motion to supplement pursuant to Rule 15(d)).

Allowing Plaintiffs to file their untimely Third Amended Complaint will unduly prejudice TC Energy, and Plaintiffs could have avoided that prejudice by amending their complaint earlier. The Court therefore should deny Plaintiffs' request.

I. THE PROPOSED AMENDMENT WOULD UNDULY PREJUDICE TC ENERGY.

Prejudice to the opposing party is the most important factor that courts should consider when deciding whether to allow amendment, and courts may deny a motion to amend where the amendment would prejudice the opposing party. *Jackson*, 902 F.2d at 1387 (affirming the district court's denial of appellants' motion for leave to file an amended complaint where the appellees would have been unduly prejudiced by the amendment); *Native Ecosystem Council v. Marten*, No. CV 17-153-M-DWM, 2018 WL 10498569, at *2 (D. Mont. May 22, 2018) (denying leave to amend where the proposed amendments would have prejudiced the defendants). When considering potential prejudice, courts evaluate whether the proposed amendment would "greatly change the parties' positions in the action, and require the assertion of new defenses." *Native Ecosystem*, 2018 WL 10498569, at *2 (citation omitted). "Courts are less inclined to grant a motion for leave to amend that is filed while a motion for summary judgment is pending." *Rocky Mountain Biologicals, Inc. v. Microbix Biosystems, Inc.*, 986 F. Supp. 2d 1187, 1204 (D. Mont. 2013). Indeed, only in "extraordinary cases" should parties be allowed to change legal theories after a motion for summary judgment has been filed. *Hulett v. Cont'l Res., Inc.*, No. CV 14-23-GF-BMM-JTJ, 2015 WL 12780574, at *1 (D. Mont. Dec. 22, 2015); *see also Peuse v. Malkuch*, 911 P.2d

1153, 1157 (Mont. 1996) ("Litigants should be allowed to change legal theories after a motion for summary judgment has been filed only in extraordinary cases.").

The number of claims in the Third Amendment Complaint is more than triple the number originally asserted and greater than double the number of claims that TC Energy has defended against for more than a year. As a result, TC Energy will have to assert new defenses if the amendment is allowed and likely engage in yet another round of briefing, in addition to the two rounds of motions to dismiss and lengthy summary judgment briefing pending before the Court. This would have the practical effect of rewinding the clock to where the parties found themselves over a year ago.

Plaintiffs turn a blind eye to this reality, instead arguing that TC Energy cannot be prejudiced by the amendment because TC Energy has known that Plaintiffs have "serious concerns" and intend to seek compliance with "important" – but unspecified – environmental laws. (Mem. at 7.) This attempt to blame the prejudiced party is baseless. If Plaintiffs have serious concerns about whether federal agencies have complied with important laws, it is Plaintiffs' duty to act on those concerns by asserting legal challenges. Plaintiffs failed to do so in a timely manner, and TC Energy properly moved for summary judgment on Plaintiffs' actual complaint. TC Energy had no duty to engage in conjecture and address claims that were not raised. In fact, TC Energy explicitly *faulted* Plaintiffs for

failing to challenge BLM's actions, arguing that "Plaintiffs cannot claim that the 2019 Permit unconstitutionally constrains BLM from performing its statutory duties, when BLM has discharged those duties, and IEN has identified no shortcoming in the agency's actions." (Reply in Support of Defendants TC Energy Corporation and TransCanada Keystone Pipeline, LP's Motion for Summary Judgment at 13 (Dkt. No. 115).)

Thus, it is clear that what TC Energy actually knew was that Plaintiffs were sleeping on their rights; TC Energy called Plaintiffs out on it; and TC Energy would be prejudiced by Plaintiffs' belated efforts to add claims after summary judgment briefs have been filed and argued.

Specifically, the addition of four more claims would prejudice TC Energy by delaying resolution of this matter. Plaintiffs' claims, brought pursuant to the Administrative Procedure Act, will be resolved on an administrative record that would take the United States a significant amount of time to prepare. The subsequent resolution of summary judgment motions will also extend this lawsuit well into next year. Moreover, litigation of these claims will be duplicative of the claims presented in two pending cases before this court. *See Bold All. v. U.S. Dep't of the Interior*, 4:20-cv-00059-BMM-JTJ (D. Mont.); *Assiniboine & Sioux Tribes of the Ford Peck Indian Rsrv. v. U.S. Dep't of the Interior*, 4:20-cv-00044-BMM-

JTJ (D. Mont.). Plaintiffs would suffer no prejudice in filing a separate matter that could proceed on the same schedule as these previously filed matters.

Far from an "extraordinary case[]" where amendment is appropriate, *Hulett*, 2015 WL 12780574, at *1, this case presents facts similar to those that courts have considered and squarely rejected as insufficient to warrant amendment. *See Russo-Wood*, 2019 WL 1102680, at *5; *Hulett*, 2015 WL 12780574, at *1; *accord Silva v. San Pablo Police Dep't*, 805 F. App'x 482 (9th Cir. 2020); *Rocky Mountain*, 986 F. Supp. 2d at 1204-05 (denying motion for leave to amend where summary judgment was pending in case). This Court should do the same.

II. THE PROPOSED AMENDMENT IS THE RESULT OF UNDUE DELAY.

Courts also consider whether the moving party unduly delayed in filing its motion in evaluating a motion for leave. *Jackson*, 902 F.2d at 1388. This factor is particularly relevant when a plaintiff offers no reason for its delay. *Joseph v. Bank of Am.*, No. CV-11-129-BLG-SEH-CSO, 2013 WL 3279428, at *5 (D. Mont. June 27, 2013).

According to Plaintiffs, the 2019 FSEIS and ROD support allowing them to amend their complaint for the third time. But by Plaintiffs' own admission, the State Department and BLM took these actions in December 2019 and January 2020, respectively. Plaintiffs fail to explain why they took approximately eight months to seek leave to amend their complaint. And Plaintiffs are silent as to why

they filed their own motion for summary judgment, filed a brief in opposition to Defendants' motions for summary judgment, and participated in oral argument on their challenges to the Presidential permit without once advising the Court of their intention to again amend their complaint to challenge the 2019 FSEIS and BLM ROD.

Because Plaintiffs delayed bringing the Motion by approximately eight months and offer no reason for their delay, the Court should deny Plaintiffs leave to amend their complaint. *See, e.g.*, *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) ("We have held that an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable."); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir. 1998) (affirming finding of undue delay where appellants did not given notice of their intent to amend their complaint until at least six months after they became aware of the new claims); *Joseph*, 2013 WL 3279428, at *5 (finding five month delay supported denial of motion to amend).

CONCLUSION

For the foregoing reasons, TC Energy respectfully requests that the Court deny the Motion.

September 4th, 2020 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief contains 2,371 words, excluding the caption and certificates of service and compliance.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served today via the Court's CM/ECF system on all counsel of record.

/s/ Jeffery J. Oven